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IN THE

Supreme Court of the United States

PERFECT 10, INC.,

Petitioner,

v.

VISA INTERNATIONAL SERVICE ASSOCIATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* MOTION PICTURE ASSOCIATION OF AMERICA, INC.; RECORDING INDUSTRY ASSOCIATION OF AMERICA; AND PHOTOGRAPHER, DESIGNER, AND PUBLISHER ASSOCIATIONS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, the Motion Picture Association of America, Inc. ("MPAA"); the Recording Industry Association of America ("RIAA"); the National Music Publishers' Association ("NMPA"); the Picture Archive Council of America, Inc.; the American Society of Media Photographers, Inc; the Advertising Photographers of America; AIGA; the American Society of Picture Professionals; the Association of Photographers, Limited; the British Association of Picture Libraries and Agencies, Inc.; the Graphic Artists Guild; the National Press Photographers Association; the Professional Photographers of America; the Stock Artists Alliance; the Association of American Publishers; and the Association of American University Presses respectfully urge this Court to grant the petition for certiorari. *Amici* use the Internet and other new technologies to distribute their works to consumers. *Amici* have a strong interest in the continued application of well-established and meaningful secondary liability standards against those who knowingly and materially contribute to, or profit from, the mass infringement of copyrighted works.

Amici are the following:

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[1] Pursuant to this Court's Rule 37.2, counsel of record for all parties received notice, at least 10 days prior to the due date, of the *amici curiae*'s intention to file this brief. All parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The MPAA is a trade association whose members and their affiliates include the largest producers and distributors of motion pictures and television programs in the United States.[2] Founded in 1922, the MPAA serves as the advocate of the domestic motion picture, home video, and television industries.

The RIAA is the trade association that represents the sound recording industry in the United States. Its members are United States record labels that own thousands of valuable copyrights and collectively create, manufacture, and distribute the vast majority of all sound recordings legitimately produced and sold in the United States.

The NMPA is the principal trade association representing music publishers in the United States. The NMPA works to advance and protect the interests of creators and copyright owners of musical works and, for over nine decades, has served as the leading voice of the American music publishing industry in Congress and before the courts.

The Picture Archive Council of America, Inc.'s membership is comprised of over 150 stock photography libraries worldwide that are engaged in licensing millions of images, illustrations, film clips, and other content on behalf of thousands of individual creators.

The American Society of Media Photographers represents the interests of professional photographers whose photographs are created for publication and has

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[2] The members of the MPAA are Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

nearly 6,000 members worldwide.

The Advertising Photographers of America represents more than 2,200 professionals in the photographic and advertising community.

AIGA (a/k/a The Professional Association for Design) represents more than 20,000 designers.

The American Society of Picture Professionals is a community of over 800 image experts who create, edit, research, license, manage, or publish pictures.

The Association of Photographers, Ltd. is a United Kingdom trade association of more than 1,800 photographers and photographic assistants.

The British Association of Picture Libraries and Agencies, Inc. has over 400 members who collectively represent over 400,000 photographers.

The Graphic Artists Guild is an independent labor union representing 2,200 graphic artists and designers, illustrators, cartoonists, animators, website designers, surface designers, packaging designers, artists' representatives, and art educators.

The National Press Photographers Association is an association of 9,500 news photographers and related professionals.

The Professional Photographers of America represents more than 21,000 photographers specializing in portrait, wedding, commercial, advertising, and art photography.

The Stock Artists Alliance is a global trade association representing 500 professional stock photographers.

The Association of American Publishers represents some 300 member companies and organizations that

include most of the major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses, and scholarly societies.

The Association of American University Presses is the trade association for nonprofit scholarly publishers. It has over 125 members.

SUMMARY OF ARGUMENT

This Court should grant certiorari because the decision of the Ninth Circuit majority radically changes the legal rules that govern secondary liability claims in copyright. The majority decision replaces with inapposite and misguided inquiries the law's traditional focus on the actions taken (or not taken) by the defendant before the court. In the case of claims for contributory infringement, the majority's new test is whether "other viable ... mechanisms" could step in to make the defendant's contributions. The law of every other Circuit, in contrast, asks whether the *defendant* makes material contributions to known infringing activity, not whether *other actors* might knowingly support the infringement in the defendant's absence. In the case of vicarious liability, the majority requires the copyright owner to show that the defendant's exercise of its right and ability to supervise specific acts of direct infringement would cause like infringement "in all its forms" to "necessarily cease." This Court and all other Circuits state that the test is whether the defendant "profit[s] from direct infringement while declining to exercise a right to stop *or limit it*." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (citing *Shapiro, Bernstein & Co. Inc. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963)) (emphasis added).

The majority's new rules break with the secondary liability standards that this Court has enunciated and that every other Circuit applies. The new rules stand on their head the common law principles that, as this Court unanimously reaffirmed just three years ago, always have guided the law of secondary copyright liability. *See id.* The majority's decision threatens to erode significantly the rights of all copyright holders within the Ninth Circuit to combat Internet piracy. The decision is particularly harmful to copyright owners' ability to combat piracy that is perpetrated from foreign locations (in an effort to evade American copyright jurisdiction) but that is supported with the participation of domestic entities.

ARGUMENT

I. THE ABILITY OF COPYRIGHT HOLDERS TO OBTAIN MEANINGFUL RELIEF AGAINST SECONDARY INFRINGERS IS A MATTER OF CRITICAL IMPORTANCE TO THE CONTENT INDUSTRIES, THE COPYRIGHT SYSTEM, AND THE RULE OF LAW

To appreciate the full impact of the majority's decision, it is important to consider the harms caused by online piracy and the vital role that secondary liability for copyright infringement plays in redressing those harms.

A. Online Infringement Continues To Proliferate, Causing Significant Harms To Copyright Owners

The Internet has created unparalleled opportunities – and unprecedented challenges – for the dissemination of copyrighted content. The Internet has made it possible for copyright owners to deliver more of their content to more willing customers than ever before. Unfortunately, the Internet also has been used to engage in copyright piracy on a scale never before imagined. With simple mouse clicks, Internet users can reproduce perfect digital copies of copyrighted works and distribute them around the world countless times.

As is now well known, Internet piracy of copyrighted works has reached epidemic proportions. The International Federation of the Phonographic Industry ("IFPI") estimates that "almost 20 billion songs were

illegally downloaded in 2005." *See* IFPI, *The Recording Industry 2006 Piracy Report* at 4 (*available at* www.ifpi.org/content/library/piracy-report2006.pdf). As this Court observed in *Grokster*, "the probable scope of copyright infringement," just with respect to the two networks at issue there, was "staggering." *Grokster*, 545 U.S. at 923. Studies have underscored the direct cause-and-effect relationship between online piracy and harm to industries whose businesses depend on copyright protection. *See, e.g.*, Norbert J. Michel, *The Impact of Digital File Sharing On the Music Industry: An Empirical Analysis*, Topics in Economic Analysis & Policy, Vol. 6, Issue 1, Art. 18 at 1 (2006) (surveying studies concluding that Internet piracy has decreased CD purchases by amounts ranging from 13 percent to 30 percent).

Online piracy causes other harms as well. The availability of virtually unlimited quantities of pirated content on the Internet hurts the development of legitimate online markets for authorized copies of copyrighted works. It is hard to market authorized copies of works when the "competition" is stealing them and distributing them for free, or at significantly reduced prices.

Widespread Internet piracy also erodes respect for the rule of law. As this Court and others have observed, there is ample reason to believe that the relative ease and pervasiveness of unauthorized downloading "foster[s] disdain for copyright protection[.]" *Grokster*, 545 U.S. at 929; *accord In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (Posner, J.) (describing "swappers, who are ... disdainful of copyright").

B. The Ability Of Content Owners To Obtain Meaningful Relief Against Secondary Infringers Is Critical To The Effective Protection Of Copyright

Online piracy flourishes because multiple actors profit directly, and handsomely, from the theft of others' copyrighted works.

In some cases, such as the "peer-to-peer" ("P2P") networks this Court confronted in *Grokster*, the profit flows directly from the viral growth of a service's base of infringing users: "the more [the P2P service's] software is used, the more ads are sent out and the greater the advertising revenue becomes. Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing." *Grokster*, 545 U.S. at 939-40.

The P2P business model exemplified by the *Grokster* defendants is not the only way that companies and individuals profit from infringing conduct. A number of actors may profit from online sales of infringing works – sales that can be made well below the price for authorized dissemination because infringing actors have simply helped themselves to copyrighted content. Whether the underlying business model is based on advertising, sales, or other revenue-generating mechanisms, the basic dynamic is the same: increased online infringement translates into greater monetary returns. The exponential growth of online piracy over the last decade confirms that the incentives to facilitate mass infringement have attracted, and continue to attract, many participants who profit as a result of the mass theft of copyrighted works.

The doctrines of secondary copyright liability are among the few tools that copyright owners have at

their disposal to combat the proliferation of online piracy. As this Court stated in *Grokster*, "[w]hen a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement." *Id.* at 929-30.

In a series of hard-fought cases, copyright owners have used the doctrines of secondary liability in an effort to push back the tide of online piracy. *See, e.g.*, *Grokster*; *Aimster*; *A&M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). These litigation successes against P2P networks have helped set the stage for the emergence of legitimate online content retailers, such as Apple's iTunes and Amazon.com.

While copyright holders have achieved notable legal successes, Internet piracy continues to escalate. Increasingly, online infringement is driven by distributors who locate their computer servers overseas, beyond the effective reach of United States copyright law. *See* Section III, *infra*. All of this makes it more important than ever that the law continue to provide copyright owners with meaningful remedies against secondary infringers.

II. THE NINTH CIRCUIT MAJORITY'S DECISION CRAFTS NEW STANDARDS OF SECONDARY LIABILITY THAT CONFLICT WITH ESTABLISHED LAW AND DEPRIVE COPYRIGHT OWNERS OF MEANINGFUL PROTECTION

The Ninth Circuit majority's opinion dramatically changes the secondary liability standards that courts

have applied for decades, and it does so in ways that threaten the effectiveness of secondary liability as a means to combat Internet piracy. Under the majority's decision, and contrary to longstanding law, a defendant's contribution to infringing conduct is not material, and there can be no contributory infringement liability, if *other parties* not before the court also might provide that unlawful support in the defendant's absence. The decision also reaches the equally unprecedented, and erroneous, conclusion that a defendant cannot be vicariously liable if infringement would not "necessarily cease" upon the defendant's exercise of its rights of supervision.

The majority's new rules are flatly inconsistent with established standards for contributory infringement and vicarious liability. Those copyright doctrines, like their common law antecedents, consider the defendant's liability based on *the defendant's own* actions (or inactions) and their relationship to infringing conduct.

A. The Ninth Circuit Majority's Decision Changes The Well-Established Standard For Contributory Infringement

1. Contributory Infringement Focuses On *The Defendant's* Contribution To Infringing Activity

The standard for contributory infringement has been settled for decades. The Second Circuit's *Gershwin* decision – among the most frequently cited in this area – summarizes the two-part inquiry: "one who, [1] *with knowledge of the infringing activity*, [2] *induces, causes or materially contributes to the infringing conduct of another*, may be held liable as a 'contributory'

infringer." *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (emphasis added). This Court and others have repeatedly cited *Gershwin*'s two-part test – knowledge and material contribution – as controlling. *See Grokster*, 545 U.S. at 930; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 437 n.18 (1984). *See generally* 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.04[A][3][a] (2007) (collecting numerous contributory infringement cases relying on the *Gershwin* standard).

The courts have been consistent not only in their statement of the *Gershwin* standard but in how they apply it. In particular, the courts always have focused on the facts concerning the defendant and its actions, not the potential actions of hypothetical third parties who could engage in the same conduct. The key questions always have been *what did the defendant know* (actually or constructively), and *what did the defendant do, i.e.*, how material was the defendant's contribution. In *Gershwin* itself, for example, the court focused on the contributions that the defendant, a management organization, made to infringing performances of musical compositions. Analyzing the evidence of what that defendant did – forming and directing local organizations that booked the infringing performances – the court held that the defendant's contribution to the infringing activity was "material." *Gershwin*, 443 F.2d at 1162-63. Courts in other circuits have likewise resolved the materiality inquiry by focusing on the defendant's own contributions and how significantly those contributions furthered the infringing activity. *See, e.g., Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 846 (11th Cir. 1990) (defendant's provision of funds and equipment that "encouraged the

duplication of [copyrighted] program" was material); *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 160-61 (3d Cir. 1984) (defendants' provision of advertising, accounting, and administrative support to direct infringer was material).

The courts' consistent focus on the defendant's own knowledge and contribution is not surprising. The standards of secondary liability in copyright law, as in other areas of the law, further important principles of deterrence. As this Court stated in *Grokster*, contributory infringement standards are drawn from their antecedents in the common law. *See* 545 U.S. at 930 (citing, *inter alia*, *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62-63 (1911)). Judge Posner made the same point in *Aimster*, observing that the established standards for contributory infringement (knowledge and material contribution) mirror the common law elements of aiding-and-abetting liability. *See Aimster*, 334 F.3d at 651. The Restatement provides that a party is liable for another's tort if the party "*knows* that the other's conduct constitutes a breach of duty and *gives substantial assistance* or encouragement to the other so to conduct himself." Restatement (Second) of Torts § 876(b) (1979) (emphasis added). At common law, as in copyright, the focus is on the defendant's own contributions and how significant those contributions are to furthering the unlawful activity. *See id.* Comment d (in determining the substantiality of the defendant's assistance, "the nature of the act encouraged, *the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered*") (emphasis added). The defendant is responsible for the consequences of its *own* actions.

2. The Majority's Decision Subverts The Deterrence Goals That Underlie Contributory Infringement

The Ninth Circuit majority departed from the *Gershwin* standard by making the inquiry turn not on the materiality of the *defendant's own contribution*, but the existence of third parties who could provide similar support for the illegal activity. Specifically, the majority held that the plaintiff failed to state a claim because, "[i]f users couldn't pay for images with credit cards, *infringement could continue on a large scale because other viable funding mechanisms are available.*" Pet. App. at 12a (emphasis added). The majority returned to this standard repeatedly throughout its opinion:

> [B]ecause infringement ... can occur without using Defendants' payment system, we hold that payment processing by the Defendants as alleged in [the complaint] does not constitute a "material contribution" under the test for contributory infringement of copyrights.

Id. at 13a (emphasis added); *see also id.* at 10a-11a ("Even if infringing images were not paid for, there would still be infringement.").

Judge Kozinski wrote in dissent that "[t]he majority's 'other viable ... mechanisms' test conflicts with ... *Grokster* and every other material assistance case that I know of." *Id.* at 48a-49a. Judge Kozinski was right. *No* contributory infringement case has ignored a defendant's contributions on the ground that other actors provided, or could provide, similar contributions. Every other federal court properly has focused on the defendants' *own* contributions and how

material *those* contributions were to the infringing conduct at issue. The courts have always analyzed these issues in accordance with the common law underpinnings of secondary copyright liability. The majority's new standard undermines secondary liability's (and the common law's) principles of deterrence and holding actors responsible for their own actions.

The Ninth Circuit majority tried to downplay its departure from longstanding precedent by claiming that landmark secondary liability cases are limited to the "brick-and-mortar world" and "do not lend themselves well to application in an electronic commerce context." *Id.* at 13a-14a n.9. The majority's assertion that there is one set of rules for "brick-and-mortar" cases and a new set of rules for "electronic commerce" cases is just wrong. *Grokster* is the most recent and notable counter-example to the majority's claim. *Grokster* arose in the Internet context. There were multiple services (both those before the Court and other similar piracy services not in the case) all vying to provide end-users with the same services ("other viable ... mechanisms," in the Ninth Circuit's words), but that fact was irrelevant to this Court's secondary liability inquiry. This Court instead resolved the case based on each defendant's own mental state and actions. *Grokster*, 545 U.S. at 937-40; *accord Aimster*, 334 F.3d at 645, 650-52 (enjoining defendant P2P service for materially contributing to online infringement, notwithstanding that the defendant was "one of a number of enterprises" that facilitated file-swapping).

The Ninth Circuit majority's effort to relegate established secondary liability principles to the "brick-and-mortar" world is wrong not only as a descriptive

matter, but more importantly as a matter of sound policy. *See* Pet. App. at 54a-55a n.10 (Kozinski, J., dissenting). The fact that the Internet has nearly ubiquitous deployment means that it always will be possible to hypothesize "other viable ... mechanisms" that could step into the defendant's shoes and support illegal online activity. If that hypothetical possibility provides an immunity from suit, then the deterrence function of the law collapses. The reality of today's "electronic commerce" world thus makes it more critical than ever to maintain the focus of secondary liability analysis where it always has been – on the defendant's own contributions. This Court should grant certiorari to correct the Ninth Circuit's erroneous departure from established law.[3]

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[3] It is clear that if the majority had applied the correct material contribution standards, the Ninth Circuit would have reversed the order dismissing the complaint under Rule 12(b)(6). The complaint alleged that the defendants' conduct made a material contribution to infringing activity of the most basic kind, *viz.*, that the infringing sales at issue would not occur without defendants' contributions. Pet. App. at 127a-129a (First Am. Compl. ¶¶ 32, 35). While the complaint's allegations are just that – allegations, and not established facts – they clearly plead a plausible claim of material contribution under established law. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). (The knowledge prong of the contributory infringement test was not a basis for the majority's decision.) The majority's dismissal at the pleading stage, without allowing the plaintiff the opportunity to obtain discovery in support of its properly pleaded claim, compounds the majority's error.

B. The Ninth Circuit Majority's Decision Changes The Well-Established Standard For Vicarious Liability

1. Vicarious Liability Focuses On Whether *The Defendant* Has The Right And Ability To Stop Or Limit Infringement Within *Its* Supervision

The standard for vicarious liability in copyright is as well established as the standard for contributory infringement. As this Court summarized the law in *Grokster*, a defendant "infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." 545 U.S. at 930.

As with contributory infringement, the vicarious liability inquiry always has focused on the facts involving the defendant before the court and the infringing conduct within that defendant's control. In the *Shapiro, Bernstein* case, for example, the Second Circuit held that the defendant, a department store owner, was vicariously liable for infringing "bootleg" record sales by one of its concessionaires. The defendant did not have the right or the ability to stop all sales of bootleg records. But it did have the ability to do something about the infringing activity that took place in its own store. In particular, the defendant had the contractual right to require the concessionaire to observe and obey regulations concerning illegal sales. That fact, combined with the defendant's financial interest in the concessionaire's profits, including from the infringing sales, was enough to establish vicarious liability. *Shapiro, Bernstein*, 316 F.2d at 306.

Vicarious liability cases from numerous Circuits

have consistently turned on whether the defendant before the court could do something to stop or limit the infringing conduct within its control. *See, e.g., RCA/Ariola Int'l v. Thomas & Grayston Co.*, 845 F.2d 773, 781-82 (8th Cir. 1988) (manufacturer of audio-cassette duplicating machine vicariously liable for direct infringement of its retailers, because the manufacturer had control of its retailers' machines and admitted it "policed" the use of those machines). *See generally* 3 *Nimmer on Copyright* § 12.04[A][2] .

2. The Majority's Decision Changes The Standard For Vicarious Liability By Asking Whether The Defendant Can Stop Infringement Outside Its Control

On the question of vicarious liability, the Ninth Circuit majority repeated its error on contributory infringement. It changed the standard by shifting the focus from what the defendant before the court could do to stop or limit infringing conduct within its control to the question of whether like infringement *outside* the defendant's control could continue regardless of the defendant's actions. Specifically, the majority assumed that if the defendants enforced their rules to stop websites from making illegal sales, those sites would not "operate at a profit"; but the majority held this was insufficient to show defendants' ability to limit infringing conduct. Pet. App. at 31a-32a. According to the majority, even if the websites could not continue to sell pirated copies, the complaint failed because it did not allege "that the websites would completely vanish *or that infringement by these sites in all its forms would necessarily cease.*" *Id.* at n.18 (emphasis added).

Vicarious liability has never turned on whether the defendant's exercise of its rights would cause all like infringement to "necessarily cease." The relevant question always has been whether, if the defendant exercised its right and ability to police acts of infringement within its control, *that infringement* would be limited or stopped. Judge Kozinski was correct when he said, "there is no case involving secondary infringement, going back to the dance hall cases of last century, where the secondary infringer's refusal to do business with the direct infringer could have stopped infringement altogether and forever. Yet, courts have presumed that removing the particular means of infringement challenged in each case would make direct infringement more difficult and thereby diminish the scale of infringing activity." *Id.* at 58a.[4]

III. THE MAJORITY'S RE-WRITING OF THE LAW OF SECONDARY LIABILITY WILL, AS JUDGE KOZINSKI STATED, "PROVE TO BE NO END OF TROUBLE"

The majority's decision creates perverse incentives and bad public policy. Under the majority's logic, the *greater* the number of actors who support infringing

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[4] As was true of its contributory infringement analysis, the majority's new rule on vicarious liability also made a difference at the dismissal stage. The complaint alleged that the defendants' rules of conduct required websites using defendants' payment-processing services to refrain from engaging in illegal activity, and that the defendants turned a blind eye to the illegal conduct alleged in this case. Pet. App. at 122a-129a (First Am. Compl. ¶¶ 14, 19, 20-26, 35). Coupled with the undisputed sufficiency of the complaint's allegations regarding defendants' financial interest in the infringing activity, the complaint stated a plausible vicarious liability claim under established law.

conduct (or who refuse to exercise their rights to stop or limit it), the greater the likelihood their contribution will be ignored and immunized.

The potential for this logic to sap secondary liability of its effectiveness as a deterrent, and to deprive copyright owners of meaningful remedies to stop the mass infringement of their works, is palpable. One reason why online piracy continues to thrive despite copyright owners' legal victories against P2P services like Grokster, Aimster, and Napster is that, notwithstanding those successes, other entities step in to support the demand for copyright infringement on the Internet. Indeed, as this Court noted, the *Grokster* defendants explicitly positioned themselves "to satisfy a known source of demand for copyright infringement, the market comprising former Napster users." 545 U.S. at 939; *see also id.* at 925 (one defendant's proposed advertisements "touted [its] software as the '#1 alternative to Napster' and asked '[w]hen the lights went off at Napster ... where did the users go?'").

In the short time since *Grokster*, numerous entities have continued to provide support for online infringement. In the wake of some P2P services shutting down or implementing copyright filters, for example, people desiring to pay as little as possible for popular recordings or motion pictures have flocked *en masse* to new services that host and sell copies of pirated content – albeit at a small fraction of the legitimate market price. In most cases, the services defend themselves by locating their assets overseas, where service of process is difficult and enforcement of intellectual property laws is lax at best. *See* Michael Kwon, *Filtering The Smoke Out of Cigarette Websites: A Technological Solution to Enforcing Judgments Against Offshore Websites*, 30 BROOK. J. INT'L L. 1067,

1067 (2005) ("[S]maller actors who operate off-shore websites can find both geographical and virtual safe havens to avoid enforcement of judgments against them."). These actors know that if a copyright owner successfully asserts its rights and shuts down an infringing website, they can "easily move their operations to servers in other remote jurisdictions." Pet. App. at 72a (Kozinski, J., dissenting).

The recent example of AllofMP3.com, a pirate website located in Moscow, dramatically illustrates the difficulties in seeking legal redress against constantly changing and multiplying infringement sites based overseas. Copyright owners brought suit against the site in federal district court for distributing infringing sound recordings. *See Arista Records LLC, et al.*, v. *Mediaservices, Inc.*, No. 06 Civ. 15319 (NRB) (S.D.N.Y.) (filed Dec. 20, 2006). Because the site was located in Russia, the plaintiffs had to engage in protracted efforts to effect service of process. AllofMP3.com shut down briefly, but only because the United States applied diplomatic pressure on Russia to take some action against the site. Obviously, such diplomatic intervention is not a feasible basis for combating pirate sites spread around the world. And even in this instance, the relief that this exceptional diplomatic effort provided was short-lived. The site was offline only a week before reopening with a new name "MP3Sparks.com" – *and the same pirated content.*[5] As this example demonstrates, suits against foreign-based sites for their infringing conduct can be the legal equivalent of the game "Whac-a-Mole."

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[5] *See* Nate Mook, *All of MP3 Shuts Down, Resurfaces as "MP3Sparks"*, BetaNews, July 3, 2007 (*available at* www.betanews.com/article/AllofMP3_Shuts_Down_Resurfaces_as_MP3Sparks/1183495726).

The allegation in this case is that defendants support the "weak link" in the pirate service's "nefarious scheme" of basing their operations overseas: their "need to get paid" by domestic customers to whom they want to sell infringing works. Pet. App. at 72a (Kozinski, J., dissenting). The new generation of infringers must generate revenue to cover their costs and make their illicit ventures financially viable. The complaint, in short, is directed to stopping illegal transactions at the point of their greatest economic vulnerability.

There is nothing new about using secondary liability law to deter illegal acts by making them more costly to commit. As Judge Kozinski explained, courts always "presume that primary infringers have good reasons for selecting a particular means to infringe, and that other ways to do so will be more costly, more cumbersome and less efficient." *Id.* at 51a (Kozinski, J., dissenting). Whether the secondary actor is liable turns on *that actor's* knowledge of, and *its* contributions to, the illegal activity (contributory infringement), or *that actor's* right and ability to stop or limit the infringements within its control and *its* financial interest in the continuation of that infringement (vicarious liability).

The majority's decision radically changes all this. According to the majority, the fact that *others* could provide similar support, or that other infringements could continue notwithstanding the withdrawal of the defendant's participation, immunizes all who knowingly support infringing conduct, or who decline to stop or limit infringement while profiting from it. This turns on its head the deterrence policy that underlies secondary liability. It gives actors more incentive, not less, to support infringement, since the

presence of additional actors who could provide similar support decreases the likelihood that any one will be held liable. The consequences of the majority's decision are especially pernicious in the Internet context, where distributors of pirated content can and do ply their trade to American consumers from foreign countries; and where the ease of mass copying and distribution increases exponentially piracy's devastating harms. The majority's decision creates, as Judge Kozinski accurately described it, "very new – and very bad – law[.]" *Id.*

IV. THE COURT SHOULD GRANT CERTIORARI AND REVERSE THE NINTH CIRCUIT'S MISGUIDED REVISION OF SECONDARY LIABILITY LAW

Amici respectfully submit that the Court should take the immediate opportunity to review and reverse the Ninth Circuit's erroneous decision.

The Ninth Circuit's decision implicates significant questions that impact the ability of copyright holders, many of whom are located within the Ninth Circuit, to obtain meaningful protection for federally conferred rights. Time is of the essence for copyright holders in this context. The relatively short history of widespread Internet accessibility has already seen several generations of businesses that support mass infringement. With each morphing of the means to support online infringement comes continued proliferation of infringement of massive proportions. This is an area where uncertain or inadequately protected rights threaten the foundations of entire industries that play an important role in the national economy. The law in this area should not remain "in disarray." Pet. App. at 44a (Kozinski, J., dissenting).

CONCLUSION

Amici respectfully urge the Court to grant the petition for certiorari.

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